IN THE CIRCUIT COURT OF THE 9TH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 2018-CA-012128-O
GENERAL JURISDICTION DIVISION

SHARRIF K. FLOYD

Plaintiff,

v.

DR. JAMES ANDREWS, M.D.; DR. GREGORY HICKMAN, M.D.; DR. CHRISTOPHER WARRELL, M.D.; DR. TARIQ HENDAWI, M.D.; THE ANDREWS INSTITUTE AMBULATORY SURGERY CENTER, LLC; PARADIGM ANESTHESIA, P.A.; BAPTIST HOSPITAL, INC.; BAPTIST HEALTH CARE CORPORATION; GULF BREEZE HOSPITAL, INC., BAPTIST HOSPITAL, INC. d/b/a GULF BREEZE HOSPITAL; AND BAPTIST PHYSICIAN GROUP, LLC,

Defendants.
_____/

MOTION TO DISMISS COUNTS III, IV, VII, AND VIII AS TO DEFENDANTS DR. ANDREWS, BHI, BHCC, AND BPG

Come now the Defendants James Andrews, M.D.; Christopher Warrell, M.D.; Tariq Hendawi, M.D.; Baptist Hospital, Inc. ("BHI"); Baptist Physician Group, LLC ("BPG"); and, Baptist Health Care Corporation ("BHCC"), by and through their undersigned attorneys, and move to dismiss Counts III, IV, VII, and VIII of the Complaint for failure to state a claim upon which relief may be granted

pursuant to Florida Rule of Civil Procedure 1.140(b). In support, Defendants state as follows:

INTRODUCTION

The Plaintiff, Sharrif Floyd, is a former NFL football player who underwent right knee surgery in September, 2016. He has now sued his treating physicians and certain entities for what he claims is a career-ending injury to his right leg.

Plaintiff brings eight Counts against nine Defendants.[1] Of those eight Counts, four are vicarious liability claims involving allegations of agency and joint venture against Dr. Andrews, BHCC, BHI, and/or BPG.

Plaintiff fails to plead these vicarious liability claims with the specificity required under Florida law. Thus, this motion to dismiss should be granted.

LEGAL STANDARD

Florida is a fact-pleading jurisdiction. *Goldschmidt v. Holman*, 571 So.2d 422, 423 (Fla. 1990). Florida Rule of Civil Procedure 1.110(b)(2) requires that "[a] pleading which sets forth a claim for relief . . . must state a cause of action and shall contain . . . a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Unlike the more lenient notice pleading requirement of Federal Rule of Civil Procedure 8(a)(2), Florida's pleading rule "forces counsel

[1] Plaintiff includes a tenth Defendant, "Gulf Breeze Hospital, Inc.," in the caption to his Complaint but makes no allegations against that corporation. There is no entity named Gulf Breeze Hospital, Inc.

to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort." *Horowitz v. Laske*, 855 So.2d 169, 172–73 (Fla. 2003). At the outset of a suit, litigants must state their pleadings "with sufficient particularity" for a defense to be prepared. *Id.*

Plaintiff is not entitled to have the court accept as true conclusory assertions or summary claims as to the applicability of the facts alleged. *See Messana v. Maule Indus.*, 50 So.2d 874, 876 (Fla. 1951). This same rule applies to vicarious liability claims such as agency and joint venture. *Goldschmidt*, 571 So.2d at 423 ("Because the complaint failed to set forth any ultimate facts that establish either actual or apparent agency or any other basis for vicarious liability, the Holmans did not allege any grounds entitling them to relief.").

DISCUSSION

The Court should dismiss Counts III, IV, VII, and VIII as to Dr. Andrews, BHI, BHCC, and BPG because the Complaint fails to plead these claims with the specificity required under Florida law.

I. THE COMPLAINT PLEADS OPINIONS AND CONCLUSIONS THAT ARE NOT SUPPORTED BY CLEAR AND CONCISE ALLEGATIONS OF FACT.

Causes of action in Florida must set out the elements and supporting facts in simple, short, and plain language so that the court and defendants can clearly determine what is being alleged. *See* Fla. R. P. 1.110(b); *Messana*, 50 So.2d at 876

(a complaint must "plead [a] factual matter sufficient to apprise his adversary of what he is called upon to answer so that the court may, upon proper challenge, determine its legal effect"). The Complaint fails in this respect.

Plaintiff attempts to allege agency and joint venture in ¶¶ 17 to 36 of the Complaint in a convoluted and distorted manner that, when broken down, merely consists of unsupported opinions and conclusions. For example, Plaintiff sketches a tangled chart of arrows and boxes (Compl. at 7) and then opines about that chart in subparagraphs (a) through (k), variously alleging "and/or" phrases and sweeping conclusions such as:

- "BHI as the agent of and/or joint-venturer with BHCC and others including Drs. Andrews and Hickman, was a majority and controlling owner of its joint-venture ASC." (*Id.* at ¶ 18(c));

- "ASC was a joint venture involving BHCC, BHI, and Drs. Andrews and Hickman, and other local physicians, and/or acted as the agent of principals BHCC and BHI and/or Hickman and/or Andrews. Further, ASC controlled PA (itself and/or through Defendants BHCC, BHI, Andrews, Hickman)." (*Id.* at ¶ 18(d)); and,

- "Dr. Andrews was an employee of BHCC and/or an officer and director and/or the agent of BHCC, and ASC, as a Medical Director for ASC, by and through BHCC and BHI and/or his joint-venture with Defendants BHCC, BHI, and Hickman. Dr. Andrews himself, and as the agent and/or employee of BHCC, through BPG, also supervised his surgical fellows Drs. Warrell and Hendawi. Dr. Andrews billed and practiced as an agent of BPG." (*Id.* at ¶ 18(f)).

Nothing in the ensuing paragraphs clarifies these allegations or provides specific factual support. For example, Plaintiff does not specify any actual representations made by Defendants to Plaintiff or any other third party. He instead makes vague and unsupported allegations such as "Provider-Defendants engage in joint-marketing and joint-advertising to further this common enterprise" (Compl. ¶ 25)—albeit without identifying particular advertisements. Similarly, Plaintiff claims that he "selected Defendants based on the promotional statements," (*Id.* at ¶ 28), but does not identify what those promotional statements are. He also alleges that "BHCC represents to the public that it is the controlling entity in ASC," (*Id.* at ¶ 30), but does not specify how those representations are made.

Rather, Plaintiff continues to use conclusory, catch-all terminology to lump the parties together. This includes ¶ 20 of the Complaint, in which Plaintiff claims that the aforementioned "and/or" conclusions set forth in ¶ 18 show that "all incidents of medical negligence occurred within the scope of the Provider-Defendants' (ASC, BHI, BHCC, BPG, PA, and Drs. Andrews and Hickman) capacities as agents and/or principals and/or partners and/or joint-venturers and/or employers." (Compl. ¶ 20) (emphasis added).

Plaintiff fails to substantiate these conclusions with specific factual support. As such, Defendants are left in the dark as to the factual basis for what is being alleged or how to evaluate Plaintiff's conclusory claims.

This type of pleading runs afoul of Florida requirements and deprives Defendants of fair notice. "It is not permissible for any litigant to submit a disorganized assortment of allegations and argument in hope that a legal premise will materialize on its own." *Barrett v. City of Margate*, 743 So.2d 1160, 1163 (Fla. 4th DCA 1999). Rather, Florida Rule of Civil Procedure 1.110(b) requires Plaintiff to plead his claims with specific and clear factual allegations. The Complaint fails to meet this basic requirement as to the vicarious liability claims.

II. THE AGENCY CLAIMS IN COUNTS III AND VII FAIL TO STATE A CAUSE OF ACTION AS TO BHCC, BHI, AND BPG.

Counts III and VII should be dismissed because they do not include sufficient facts to meet the elements of actual agency. The elements of actual agency are (1) acknowledgment by the principal that the agent will act for him or her; (2) the agent's acceptance of the undertaking; and, (3) control by the principal over the actions of the agent. *Goldschmidt v. Holman*, 571 So.2d at 426 n.5. When one considers an action based on actual agency, "it is the right to control, rather than actual control, that may be determinative." *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 853 (Fla. 2003); *Nazworth v. Swire Fla., Inc.*, 486 So.2d 637, 638 (Fla. 1st DCA 1986).

To allege the degree of control sufficient to establish an agency relationship, a plaintiff must show that "the principal has a right to control the operative details of the agent's work." *Orlinsky v. Patraka*, 971 So. 2d 796, 800 (Fla. 3rd DCA

2007), *citing Stoll v. Noel*, 694 So.2d 701, 703 (Fla. 1997). *See also Ocana v. Ford Motor Co.*, 992 So.2d 319, 326 (Fla. 3rd DCA 2008) ("The complaint is devoid of any allegation of some of the tell-tale signs of a principal-agent relationship, such as the ability of the principal to hire, fire, or supervise dealership employees or dealer ownership.").

A. Count III Does Not Include Sufficient Facts to Support an Actual Agency Claim as to BHCC and BHI.

In Count III, Plaintiff seeks vicarious liability against BHCC and BHI on the theory that they are principals and Dr. Hickman is their agent. (Compl. ¶ 79). However, none of the three actual agency requirements are met.

First, the Complaint does not include facts to show that BHCC and/or BHI acknowledged that Dr. Hickman would act as an agent for these corporations. Second, the Complaint does not include facts to show that Dr. Hickman accepted the undertaking to act as an agent. Third, the Complaint does not include facts showing that BHCC and/or BHI had the right to control Dr. Hickman's actions.

Where any one of these elements is not met, the agency claim must be dismissed. *See, e.g.*, *Ilgen v. Henderson Properties, Inc.*, 683 So.2d 513, 515 (Fla. 2d DCA 1996) (affirming dismissal of an agency claim where plaintiff did not specifically allege that the principal acknowledged that the alleged agent would act for him). Thus, Count III must be dismissed.

B. Count VII is Similarly Unsupported by Sufficient Facts to Show Actual Agency Liability as to BHCC and BPG.

In Count VII, Plaintiff claims that BHCC and BPG are liable as principals for the acts of agents Dr. Andrews, Dr. Hendawi, and Dr. Warrell. (Compl. ¶ 104). Just as he did in Count III, Plaintiff again groups together all purported principals and agents without any of the specific factual allegations necessary for an actual agency claim. As such, Count VII should be dismissed as to BHCC and BPG.

As to the first element, the Complaint does not include facts to show that BHCC and BPG acknowledged that the alleged agents—Dr. Andrew, Dr. Hendawi, and Dr. Warrell—would act as their agents. Second, the Complaint fails to allege that each of these three individuals accepted this undertaking. Third, the Complaint fails to include facts to show that BHCC and BPG each had the right to control the actions of these three doctors.

Thus, the Court should dismiss Count VII as to BHCC and BPG.

III. THE JOINT VENTURE ALLEGATIONS AS TO BHI, BHCC, AND DR. ANDREWS IN COUNTS IV AND VIII FAIL TO INCLUDE SUFFICIENT FACTS.

Plaintiff alleges joint venture in Counts IV and VIII. These Counts must be dismissed for two reasons: Count VIII contains contradictory information, and Counts IV and VIII fail to plead all elements of a joint venture claim.

A. Plaintiff Drafted Count VIII in a Flawed and Inconsistent Manner That Does Not Clearly Identify the Defendants Being Sued.

Plaintiff carelessly drafted Count VIII in a manner that includes contradictory information about which Defendant(s) are being sued under this theory. These errors require dismissal of Count VIII.

It is axiomatic that "[c]ontradictory allegations within a single count neutralize each other and render the count insufficient on its face." *Peacock v. Gen. Motors Acceptance Corp.*, 432 So.2d 142, 146 (Fla. 1st DCA 1983). Here, Plaintiff captioned Count VIII as a joint venture cause of action against four Defendants: BHI, BHCC, ASC, and Dr. Andrews. (Compl. at 26). However, in ¶¶ 110, 112, and 114, Plaintiff adds Dr. Hickman to the group and eliminates ASC—the Complaint states, "This is a count seeking vicarious liability against Defendants, BHI, BHCC, Andrews and Hickman based on their joint venture in ASC." (*Id.* at ¶ 110) (emphasis added). He then reverts back to suing Defendants ASC, BHCC, BHI, and Dr. Andrews in ¶ 120. (*Id.* at ¶ 120) (emphasis added).

These errors render Count VIII insufficient on its face and deprive Defendants the basic right to know who is being sued for what. Count VIII must therefore be dismissed.

B. Counts IV and VIII Fail to Plead Each Element of a Joint Venture.

To plead a joint venture, a plaintiff must allege, in addition to the standard elements of a contract, five elements: (1) a community of interest in the

performance of the common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained. *Jackson–Shaw Co. v. Jacksonville Aviation Auth.,* 8 So.3d 1076, 1089 (Fla. 2008). "The absence of one of the elements precludes a finding of a joint venture." *Id.*

A mere allegation that a joint venture was created is "purely a legal conclusion." *Kislak v. Kreedian,* 95 So.2d 510, 514 (Fla. 1957). Thus, "the complaint must sufficiently allege the ultimate facts which, if established by competent evidence, would support a decree granting the relief sought under law." *Id.* (dismissing joint venture claim for failure to meet all five elements).

Here, the Complaint fails to include a sufficient factual basis for Counts IV or VIII as to BHI, BHCC, and/or Dr. Andrews. These Counts must be dismissed.

i. Count IV is Not Supported by a Sufficient Factual Basis.

In Count IV, Plaintiff alleges vicarious liability against BHI, BHCC, and Dr. Andrews "based on their joint venture in ASC." (Compl. ¶ 85). This claim fails to include sufficient facts to meet all elements of a joint venture. For example, as to the second required element, the Complaint fails to allege that BHI, BHCC, and Dr. Andrews could control the actions of ASC. This type of "control" requires Plaintiff to show that each of these Defendants enjoyed the right to control the day-to-day operations at ASC. *See, e.g., E & H Cruises, Ltd. v. Baker*, 88 So.3d 291,

295 (Fla. 3d DCA 2012) (finding no joint venture when one party "ha[d] no control over, nor say in, how the [business's services] [were] operated"); *cf. Arango v. Reyka*, 507 So.2d 1211, 1213–14 (Fla. 4th DCA 1987) (holding that evidence of joint control existed where hospital maintained control over day-to-day operations such as patient scheduling and group assignments).

Similarly, as to the third element, the Complaint does not include specific facts to show that BHI, BHCC, and Dr. Andrews *each* had a joint proprietary interest in the subject matter of ASC. Instead, Plaintiff summarily claims: "Defendants maintained a joint-propriety interest in subject matter of ASC [through BHCC's 54.35% interest in ASC through BHI]. Further Dr. Andrews is, upon information and belief, the next largest proportionate owner of ASC, and, upon information and belief, Dr. Hickman is also a part-owner." (Compl. ¶ 90). Plaintiff also baldly claims that Defendants agreed to share in the profits and losses of ASC (*Id* ¶¶ 91, 93)—without any supporting details such as *when, how,* or *where* these parties agreed to any of these contractual obligations.

For any or all of these reasons, the Court should grant BHI, BHCC, and Dr. Andrews' motion to dismiss Count IV.

ii. Count VIII is Not Supported by a Sufficient Factual Basis as to BHI, BHCC, and Dr. Andrews.

Even if this Court were to allow Plaintiff to proceed on a facially inconsistent claim that does not specify which Defendants are being sued, Count VIII must still be dismissed for failing to allege a sufficient factual basis.[2]

Count VIII fails to meet all five elements of this claim against BHI, BHCC, and Dr. Andrews. (Compl. ¶ 110). For example, as to the requirement of joint control, the Complaint merely pleads that Defendants "jointly control their operations in the provision of surgical and anesthesia services to professional athletes, including Plaintiff, through ASC." (Compl. ¶ 114). This is not enough. Plaintiff must show the parties enjoyed the right to bind the others with reference to the subject matter of the co-adventure such that each had the right to control ASC's day-to-day operations. *See Arango*, 507 So.2d at 1213. This second element is not met.

Similarly, Plaintiff fails to allege sufficient facts to show that BHI, BHCC, and Dr. Andrews each enjoyed a joint proprietary interest in ASC. Just as in Count IV, the Complaint states the unsupported conclusion that Defendants "maintained a

[2] Defendants do not know who is being sued in Count VIII for the reasons stated above. For purposes of this motion to dismiss, Defendants are assuming BHI, BHCC, Dr. Andrews, and Dr. Hickman are at issue. In the event that the Court treats Count VIII as a claim against BHI, BHCC, ASC, and Dr. Andrews (as titled in the caption for Count VIII) as opposed to one against BHI, BHCC, Dr. Andrews, and Dr. Hickman (as alleged in ¶ 110), Defendants request the opportunity to supplement this motion as necessary.

joint-proprietary interest in . . . ASC" with BHCC owning a 54.35% interest in ASC "through its subsidiary BHI" and BHCC "exercises control of ASC." (Compl. ¶ 115). Plaintiff does not specify any facts to support these alleged contractual relationships. In the same way, as to the requirement of showing that Defendants shared in profits and losses, the Complaint baldly concludes that the parties "contracted to share in certain profits" and "agreed to share in certain losses" without identifying those agreements or contracts. (*Id.* ¶¶ 118, 119).

For any or all of these reasons, Count VIII must be dismissed as to BHI, BHCC, ASC, and Dr. Andrews.

CONCLUSION

The Fifth DCA wrote in affirming a motion to dismiss: "The lack of specificity is particularly troublesome here where nine separate defendants are lumped together in each count in a complaint that often fails to particularize which of the nine defendants made which statements." *Simon v. Celebration Co.*, 883 So.2d 826, 833 (Fla. 5th DCA 2004).

The same concern applies here. Plaintiff attempts to impose vicarious liability on Defendants by deliberately tangling and obfuscating the relationships between the parties. This is not allowed under Florida law. Because Plaintiff fails to plead Counts III, IV, VII and VIII with particularity, the Court should grant this motion to dismiss as to Dr. Andrews, BHI, BPG, and BHCC.

/s/ J. Nixon Daniel, III
J. NIXON DANIEL, III
Florida Bar No.: 228761
Beggs & Lane, RLLP
501 Commendencia Street (32502)
P. O. Box 12950
Pensacola, FL 32591-2950
850-469-3306
850-469-3331 – fax

Attorney for Defendants James Andrews, M.D.; Tariq Hendawi, M.D.; Christopher Warrell, M.D.; Baptist Hospital, Inc.; Baptist Health Care Corporation; Gulf Breeze Hospital, Inc.; Baptist Hospital, Inc. d/b/a Gulf Breeze Hospital and Baptist Physician Group, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Courts E-Filing Portal on this 15th day of March, 2019 to:

Brad R. Sohn, Esquire
The Brad Sohn Law Firm, PLLC
2600 S. Douglas Road – Suite 1007
Coral Gables, Florida 33134
brad@sohn.com

and

Gabriel E. Nieto, Esquire
Rasco Klock Perez & Nieto, P.L.
2555 Ponce De Leon Blvd. – Suite 600
Coral Gables, Florida 33134
gnieto@rascoklock.com

Attorneys for Plaintiff

Jesse Suber, Esquire
Henry Buchanan, P.A.
2508 Barrington Circle (32308)

Post Office Box 14079
Tallahassee, Florida 32317-4079
jsuber@henryblaw.com

Attorneys for Defendants Gregory Hickman, M.D and Paradigm Anesthesia, P.A.

S. William Fuller, Jr., Esquire
Hall Booth Smith, P.C.
2565 Barrington Circle
Tallahassee, Florida 32308
wfuller@hallboothsmith.com

Attorneys for ASC

/s/ J. Nixon Daniel, III
J. NIXON DANIEL, III
Beggs & Lane, RLLP
Florida Bar No. 228761